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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

KNIGHTS OF COLUMBUS COUNCIL NO. 2961,
and DONALD L. CREATORE,
Petitioners,

v.

THE TOWN OF TRUMBULL, CONNECTICUT,
and DAVID A. WILSON, TRUMBULL FIRST
SELECTMAN,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

KEVIN J. HASSON *
THE BECKET FUND
FOR RELIGIOUS LIBERTY
1919 Pennsylvania Avenue
Suite 300
Washington, DC 20006
(202) 736-2160

PAT A. CIPOLLONE
KIRKLAND & ELLIS
655 15th Street, N.W.
Suite 1200
Washington, DC 20005
(202) 879-5000

* Counsel of Record

Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the Establishment Clause requires a town government to ban a private party's Christmas creche from the Town Green, which the town concedes is a traditional public forum, and which has been used for other unattended private displays.

PARTIES TO THE PROCEEDING

All parties to this petition are listed in the caption. Petitioner Knights of Columbus Council No. 2961, is an unincorporated association. There are no corporate petitioners.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The order of the Court of Appeals (Pet. App. 1a) is unreported. The District Court's Findings of Fact and Conclusions of Law (Pet. App. 2a) are also unreported.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was entered on December 21, 1994.

See Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The District Court's jurisdiction was based on 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I

> Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Town Green of Trumbull, Connecticut is a traditional public forum. All parties have so stipulated. (Pet. App. 5a ¶ 5). The Green has long been open to private parties for all kinds of events, both secular and religious. For example, the Green has been used by the American Legion for Veterans' Day and Memorial Day Commemorations involving both secular and religious activities. (Pet. App. 4a ¶ 11). The Green and its parking lot have hosted art sales and car washes. (*Id.*). And the Green has even been used for a National Prayer Day. (*Id.*).

The Town Green has likewise been used as a public forum for unattended displays, both religious and secular. For approximately fifteen years, the holiday display on the Green has included both a decorated, lit Christmas tree and a menorah erected by a local synagogue. (Pet. App. 4a ¶ 12). Veterans' Day Ceremonies regularly include the placing of an unattended wreath on the Green. (Pet. App. 4a ¶ 11).

In November 1993, Petitioner Donald L. Creatore, on behalf of himself and the other members of Petitioner Knights of Columbus Council No. 2961, applied to Respondent David A. Wilson, First Selectman of Trumbull, for permission to place a creche on the Green during the 1993 winter holiday season. (Pet. App. 3a ¶ 5). As First Selectman, Wilson has the authority to grant private individuals and groups permission to use the Green. During the 1993 holiday season, as in previous years, he allowed a private religious group to display a menorah on the Green in celebration of Chanukah. (Pet. App. 4a ¶ 13). Yet Wilson told Creatore and the Knights that they could not erect their creche. (Pet. App. 3a ¶ 5).

One of the reasons Wilson gave for the denial was that the application had come too late. So, in early 1994, Creatore and the Knights applied again to place their nativity scene on the Green during the next winter's holiday season. (Pet. App. 3a ¶ 6). On May 9, 1994, Wilson granted the Knights permission to erect the creche: "I wish to acknowledge your recent letter concerning the placement of a creche on town hall Green in conjunction with our Annual Green Lighting Programs. I have no objection to your plans . . . ." (*Id.*). Wilson requested only that Creatore submit a set of plans to the Town Building Official for approval. The plans were submitted, and the Building Official approved them on August 18, 1994. (Pet. App. 3a ¶ 7).

Creatore and the Knights planned to erect their creche on the Green on Saturday, December 17. (Pet. App.

3a ¶ 8). But on Wednesday, December 14—just three days before that date, and over seven months after they had received their permit—First Selectman Wilson phoned Creatore to inform him that the Town was revoking the permit. (Pet. App. 4a ¶ 9). Wilson's sole reason for revoking the permit was the religious message conveyed by the creche. (Pet. App. 6a ¶ 8).

On Friday December 16, Creatore and the Knights filed a complaint in the United States District Court for the District of Connecticut alleging that the Town of Trumbull and First Selectman Wilson had deprived them of their First Amendment rights, in violation of 42 U.S.C. § 1983. At the same time, they moved for a Temporary Restraining Order and/or Preliminary Injunction allowing them to display their creche.

On Monday December 19, the district court held an evidentiary hearing during which it took live testimony from all parties and from other witnesses. The court also received into evidence a number of exhibits.

On Tuesday December 20, the district court denied the motion for a preliminary injunction. The court accepted the parties' stipulation that the Town Green was a traditional public forum, and found that the revocation of the permit was a content-based restriction on their speech. (Pet. App. 6a, ¶¶ 5-8). Nevertheless, on the strength of the Second Circuit's decision in *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990), the district court ruled that if the Town did not suppress the proposed religious speech it would violate the Establishment Clause, because a reasonable person might mistake petitioners' speech for the government's. (Pet. App. 7a-10a ¶¶ 13-26). That was so, the court reasoned, in part because "nothing in the context of the creche . . . secularize[d] the . . . undeniably religious message" that petitioners wished to send. (Pet. App. 9a ¶ 19).

Avoiding such mistaken impressions was, the district court found, a compelling state interest that justified a content-based restriction on petitioners' speech in a traditional public forum. (Pet. App. 6a ¶ 9, 11a ¶ 26). And banning all such unattended religious symbols from the forum was, the district court thought, "narrowly tailored" to serve that "compelling interest." (Pet. App. 11a ¶¶ 27-28).

The next day petitioners filed a timely notice of appeal, as well as a motion for an expedited appeal and for an injunction pending appeal. On Thursday December 22, a panel of the United States Court of Appeals for the Second Circuit granted the motion for an expedited appeal, affirmed the district court's decision on the merits and denied the motion for injunction. The court did not file an opinion, but, like the district court, apparently relied on its prior decisions in *Kaplan* and in *Chabad-Lubavitch of Vt. v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992).

REASONS FOR GRANTING THE WRIT

On January 13, 1995, this Court granted the petition for a writ of certiorari in *Capitol Square Review and Advisory Board v. Pinette*, No. 94-780. The issue before this Court in *Pinette* is the same as the issue raised by the present petition, whether the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, requires governments to ban privately sponsored religious displays from traditional public fora. See Petition for a Writ of Certiorari, No. 94-780 at i.[1]

It is an issue over which the Courts of Appeals are divided. *Compare Chabad-Lubavitch of Georgia v.*

[1] In *Pinette*, the United States Court of Appeals for the Sixth Circuit held that the Free Speech Clause of the First Amendment requires the State of Ohio to permit the Ku Klux Klan to erect a cross in a public square adjacent to the Statehouse. *Pinette v. Capitol Square Review and Advisory Board*, 30 F.3d 675 (6th Cir. 1994), *cert. granted*, No. 94-780 (January 13, 1995).

Miller, 5 F.3d 1383 (11th Cir. 1993) (*en banc*) (State must permit a Jewish group to display Chanukah menorah in state capitol rotunda), *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) (*en banc*) (reversing injunction prohibiting private parties from displaying religious paintings in public park during Christmas), and *Pinette, with Smith v. County of Albermarle*, 895 F.2d 953 (4th Cir. 1990) (county may not permit Jaycees to display creche on county courthouse lawn), *and Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989) (city may not permit private Jewish group to display menorah in city hall park).

We respectfully suggest, for the reasons set forth below, that this Court grant plenary review in the present case as well, and set it for argument together with *Pinette*. Toward that end, petitioners are prepared to meet any expedited briefing schedule the Court may order.

Alternatively, and at a minimum, the Court should hold this petition for appropriate action in light of its decision on the merits in *Pinette*.

1. This case presents the issue of the permissibility of private religious displays in traditional public fora more squarely than does *Pinette*. In this case all parties agree that the creche at issue is purely religious speech. (Pet. App. 6a ¶¶ 6-8). By contrast, the character of the speech in *Pinette* is disputed. The petitioners in *Pinette* assert that the cross at issue there conveys a purely religious message. See Petition for a Writ of Certiorari, No. 94-780, at 9. But the *Pinette* respondents, the Ku Klux Klan and some of its members, disagree. They defend their erection of a cross in the Ohio Statehouse Capitol Square on the ground that their cross is largely *political* speech. Brief in Opposition, No. 94-780, at 16-18. One of the "distinguishing features" of *Pinette*, according to the respondents in that case, is that "the Klan's cross was *political*." *Id.* at 16 (emphasis added). It was political because the Klan's cross, unlike most crosses, "combine(s) religious and political views," *id.* For that reason, the Klan ar-

gues, cases like the present one, in which the state has banned purely religious speech in a traditional public forum, are inapposite to *Pinette*. *Id.* at 17-18.

The Klan's argument is far from frivolous. Klan crosses are usually thought of as symbols of extreme political views, or hate-speech. *Cf. R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992). They are not noted for their theological content. The character of the speech at issue in *Pinette* is therefore somewhat blurred. Consequently, that case does not unambiguously present the issue which is dividing the courts of appeals.

The present case does. It involves purely religious speech. The Knights of Columbus sought to erect a creche in the Trumbull Town Green solely to give voice to their fervent belief in the religious significance of Christmas. Thus, unlike the Klan's cross in *Pinette*, the Knights of Columbus' creche is unburdened by political overtones. Nor is it a symbol of hate-speech, as Klan crosses often are. It is purely and simply religious speech.

Indeed, the Knights' creche was banned precisely because it was purely religious speech. The district court found that it was "undisputed that permission for the erection of the creche was revoked due to the religious content of that symbolic speech." (Pet. App. 6a ¶ 8).

In short, Trumbull Connecticut concedes its Town Green is a traditional public forum. (Pet. App. 3a ¶ 4, 14a ¶ 11). And the town permits the Green's use for free-standing secular displays. It is only free-standing religious displays, such as the Knights of Columbus' creche, that are banned. (Indeed, last year it was only creches that were banned; in 1993, as for the previous fifteen years, Trumbull permitted a privately sponsored, free-standing menorah on the Town Green. (Pet. App. 4a ¶ 12). This case therefore presents more squarely than *Pinette* the issue currently dividing the courts of appeals.

2. The facts of this case are also far more typical of the private-religious-display question than the facts in

Pinette. The usual—indeed, annual—context for this sort of dispute is Christmas and Chanukah. The overwhelming majority of reported appellate cases concerning private religious displays in public fora deal with a creche or menorah. Only one, *Pinette*, concerns a Klan cross, which is not a traditional symbol of any holiday. This case, by contrast, exhibits the issue in its natural habitat, a traditional Christmas symbol displayed during the Christmas season.[2]

3. There are no procedural obstacles to consideration of the issue here. The posture of the case is the affirmance of a denial of a motion for preliminary injunction. Nevertheless, that does not render the case either moot or less than fully ripe. Short-term denial of the right to speak or publish is a classic example of an issue that is "capable of repetition yet evading review." *See, e.g., Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546-47 (1976). Moreover, the issue on which the district court decided the case is a pure question of law—whether the Establishment Clause would be violated by permitting display of a private creche in a traditional public forum.

The Court of Appeals' position is likewise clear. It has addressed this precise issue twice before, in *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), and in *Chabad-Lubavitch of Vt. v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991). An opinion in the present case would add nothing. Finally, a trial and decision on the merits would not provide the Court with a more elaborate record. The district court made extensive findings of fact and conclusions of law after a full evidentiary hearing in which the court heard live testimony from all the parties, as well as from other witnesses, and received a number of exhibits. In addition, most, if not all, of the salient facts were stipulated to by all parties. In short,

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[2] The holiday context of a religious symbol may be important for some modes of Establishment Clause analysis. *Cf. Lynch v. Donnelly*, 456 U.S. 668 (1984).

the appellate record, while concise, focuses the issue clearly, and is as extensive as it could ever be in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the petition should be held for appropriate disposition in light of the Court's decision on the merits in *Capitol Square Review and Advisory Board v. Pinette*, No. 94-780 (*cert. granted* January 13, 1995).

Respectfully submitted,

KEVIN J. HASSON *
THE BECKET FUND
FOR RELIGIOUS LIBERTY
1919 Pennsylvania Avenue
Suite 300
Washington, DC 20006
(202) 736-2160

PAT A. CIPOLLONE
KIRKLAND & ELLIS
655 15th Street, N.W.
Suite 1200
Washington, DC 20005
(202) 879-5000

* Counsel of Record

Counsel for Petitioners

January 18, 1995

APPENDIX

APPENDIX

[Filed Dec. 21, 1994]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

94-9297

KNIGHTS O[illegible] COLUMBUS COUNCIL No. 2961

v.

TOWN OF TRUMBLE [sic]

ORDER

IT IS HEREBY ORDERED that the motion for an injunction pending appeal is denied, the appeal is expedited and the order of the district court is affirmed.

/s/ Ellsworth A. Van Graafeiland

/s/ J. Walker

/s/ José A. Cabranes
Circuit Judge

12/21/94

[Filed Dec. 21, 1994]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civ. No. 3:94CV2143(AHN)

DONALD L. CREATORE &
KNIGHTS OF COLUMBUS COUNCIL No. 2961

v.

THE TOWN OF TRUMBULL, CONNECTICUT &
DAVID A. WILSON, TRUMBULL FIRST SELECTMAN

CORRECTED RULING ON PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUCTION

This written ruling memorializes the court's oral ruling delivered this morning.

At the outset, the court reiterates its comments of yesterday: this is *not* an easy case. It is troublesome not only from a legal perspective, in that it requires intricate legal analysis, but also from an emotional perspective. As Judge Burns acknowledged in *Annunziato v. New Haven Bd. of Aldermen*, 555 F. Supp. 427, 429 (D. Conn. 1982) and again in *Libin v. Town of Greenwich*, 625 F. Supp. 393, 399 (D. Conn. 1985), cases touching on the relationship between government and religion "focus our attention on strongly held and conflicting values" and are often emotionally charged.

With this in mind, the court now makes its findings of fact and sets forth its conclusions of law.

FINDINGS OF FACT

1. The plaintiffs are Donald L. Creatore, a citizen of Trumbull, and the members of Knights of Columbus, Council No. 2691, a private organization of which Mr. Creatore is a member.

2. The defendants are the Town of Trumbull, Connecticut ("the Town") and David A. Wilson, Trumbull First Selectman.

3. The plaintiffs filed an application for a temporary restraining order ("TRO") against these defendants on December 16, 1994, seeking to erect a creche on the public Green adjoining the Trumbull Town Hall. The action was brought pursuant to 42 U.S.C. § 1983, and alleges that the defendants' denial of permission to erect the creche violates the plaintiffs' First Amendment rights.

4. The parties have stipulated that the Trumbull Town Green, hereinafter, "the Green," is a traditional public forum.

5. In November, 1993, the plaintiffs sought permission to erect a creche on the Green but permission was denied.

6. In early 1994, the plaintiffs again sought permission to erect the creche. On May 9, 1994, First Selectman Wilson granted permission for the erection of the creche by way of a letter sent to Mr. Creatore. The letter stated: "I wish to acknowledge your recent letter concerning the placement of a creche on town hall Green in conjunction with our Annual Green Lighting Programs. I have no objection to your plans. . . ."

7. The letter from First Selectman Wilson permitting the erection of the creche requested that Mr. Creatore submit plans to a Town building official for approval. Those plans were submitted and, on August 18, 1994, they were approved.

8. The creche was to be erected on December 17, 1994.

9. On December 14, 1994, First Selectman Wilson telephoned Mr. Creatore and revoked permission for the erection of the creche. He followed this call with a letter dated December 14, 1994.

10. The proposed site of the creche was on the Green, very near to the front entrance of the Town Hall. The proposed creche was to be approximately four feet by six feet large, and the figures were to be approximately one and one half feet tall. The creche was to be illuminated at night. No agreement was reached between the plaintiffs and the Town as to any sign to accompany the creche.

11. The Green has been used for many years as the location for a wide variety of events, both religious and secular. These events include an annual art fair, an international food festival, Veteran's and Memorial Day commemorations involving both religious content and the laying of a wreath, and a National Prayer Day.

12. In addition, for the last approximately sixteen years, a Menorah and a Christmas tree have stood together on the Green during the holiday season. The Menorah was erected by a private religious group. The Christmas tree was decorated by the Town, and a private group has participated in a Christmas tree lighting celebration. The tree that is decorated is a permanent part of the landscape and is approximately 150 feet tall.

13. In 1993, a Menorah and a Christmas tree and a large wooden sign reading, "Seasons greeting. Peace and Liberty for all," were displayed on the Green.

14. This year, that is, 1994, the menorah was not displayed on the Green because the private group that sponsored it in past years chose not to erect it there.

15. A lighted Christmas tree is currently being displayed on the Green.

16. On December 14, 1994, a new Town policy barring the display of solitary, unattended religious symbols on the Trumbull Town Green was instituted, but was not publicly announced.

17. The only government involvement with the proposed display of the creche, which is entirely privately sponsored, would be the granting of permission to allow it on government property.

18. The court visited the site of the proposed creche on December 17, 1994.

19. The court adopts the stipulation of facts entered into between the parties and made a part of the record at the start of this hearing, which began yesterday, December 19, 1994, and continues this morning for the announcement of the court's ruling.

CONCLUSIONS OF LAW

1. This action is before the court on an application for a TRO. By agreement, the court will treat the plaintiffs' application as one for a preliminary injunction.

2. "A party seeking preliminary injunctive relief must establish (a) that the injunction is necessary to prevent irreparable harm and (b) either that (i) it is likely to succeed on the merits of the underlying claim or (ii) there are sufficiently serious quesions going to the merits of the claim as to make it a fair ground for litigation and that the balance of the hardships tips decidely toward the movant." *Eng v. Smith*, 849 F.2d 80, 81-82 (2d Cir. 1988).

3. The court finds that the plaintiffs have satisfied the first prong of this test. It is well-settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

4. The court now considers the likelihood that the plaintiffs' claim will succeed on its merits.

5. The plaintiffs seek to erect the creche on the Town Green, a conceded "traditional public forum." Traditional public fora are those that "have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983).

6. It is undisputed that the creche is a religious symbol.

7. It is undisputed that the creche constitutes symbolic speech.

8. It is also undisputed that permission for the erection of the creche was revoked due to the religious content of that symbolic speech.

9. The government may enforce a content-based exclusion on speech in a traditional public forum only if that exclusion is "necessary to serve a compelling state interest" and is "narrowly drawn to achieve that end." *Perry,* 460 U.S. at 45.

10. The Town argues that its content-based exclusion of the creche serves its interest in avoiding a violation of the Establishment Clause of the First Amendment and that excluding solitary, unattended displays of religious symbols from the Green is a narrowly tailored means to achieve that end.

11. The court must therefore consider whether, if the Town were to permit the creche, it would violate the Establishment Clause. In so doing, the court is guided by the test articulated in *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971). Under *Lemon,* the grant of permission to erect the creche on the Green would not violate the Establishment Clause if the Town's action (1) has a secular purpose; (2) does not have the primary effect of advancing or inhibiting religion; and (3) does not foster excessive entanglement with religion.

12. The court finds that there is no serious dispute as to whether the Town's action in granting permission for the erection of the creche would fail the first and third prongs of the *Lemon* test. Granting permission would advance the secular purpose of maintaining a public forum open to all speech regardless of content. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 271-72 (1981) (finding that "an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose"). In addition, there is no basis in the record to support a finding of excessive entanglement; it is undisputed that the only government involvement with the proposed project is the granting of permission.

13. The Town's primary objection is that to allow the creche would violate the *Lemon* test's second prong. To determine whether the creche would have the primary effect of endorsing religion, the court must consider the display of the creche in its "particular setting." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 597 (1989). This is a very fact-intensive inquiry. *See, e.g., Lee v. Weisman*, 112 S. Ct. 2649, 2661 (1992) (observing that "[o]ur Establishment Clause jurisprudence remains a delicate and fact-sensitive one"). As part of this inquiry, the court considers what a reasonable observer would perceive when he or she evaluates whether the creche conveys a message of government endorsement of religion. *Allegheny*, 492 U.S. at 630. This reasonable observer is familiar with and takes into account the government's historical practice with respect to the challenged action. *See id.*

14. Based on the record, the court finds that while some factors make it less likely that a reasonable observer would perceive that Trumbull was endorsing Christianity, other factors suggest that the reasonable observer would attribute the creche to the Town and infer that it was endorsing religion.

15. The court agrees with the plaintiffs that it is significant that the Green is a traditional public forum. The Green has, in the past, been open to many different uses, including religious uses. The record reflects that "live" religious speech has taken place on the Green, as on National Prayer Day and at the Memorial and Veteran's Day commemorations. The record also reflects that "symbolic" religious speech has taken place on the Green, as exemplified by the Menorah and Christmas tree displays of previous years.

16. Thus, a reasonable observer, familiar with the prior uses of the Green and its status as a traditional public forum, would take these factors into consideration when forming a conclusion as to whether the Town is endorsing Christianity. *See, e.g., Kreisner v. City of San Diego*, 1 F.3d 775, 784 (9th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 690 (1994) (assuming "that the reasonable observer is aware of [the] Park's public forum nature and the City's first-come, first-served permit policy").

17. Other factors, however, suggest that the reasonable observer would conclude that the Town was endorsing religion. Among these is the creche's proposed location on the Green near to the front entrance of the Town Hall. The Green abuts Town Hall. This close proximity to the seat of government carries a great risk of misattribution, suggesting that the reasonable observer will in fact perceive that Trumbull is endorsing Christianity.

18. In addition, no agreement was reached between the plaintiffs and the Town with respect to the erection of any signs, by the Town or the plaintiffs or both, that would indicate the creche's private sponsorship and/or the Town's neutrality towards the creche's religious content. The court finds that the fact that the creche would be unattended and that nothing at the site would fulfill the role of a live speaker increases the likelihood that the creche would be misattributed to the Town.

19. In short, nothing in the context of the creche, including the arguably secular symbol of the nearby Christmas tree, secularizes the creche's undeniably religious message, or detracts from the fact that this religious symbol is overwhelmingly surrounded by the presence of government. *See Allegheny*, 492 U.S. at 573, 597 (finding that "nothing in the context of the display [of the creche] detracts from the creche's religious message").

20. Given these facts, the court finds that this case is governed by *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990). *Kaplan* found that an unattended, solitary display of a large menorah in a park *adjacent to City Hall*, a traditional public forum, violated the Establishment Clause. The court emphasized that City Hall Park is "public property closely associated with a core government function." *Kaplan*, 891 F.2d at 1028. The *Kaplan* court, quoting the United States Supreme Court in *Allegheny*, wrote that in light of the Menorah's location " '[n]o viewer could reasonably think that it occupies this location without the support and approval of the government.' " *Kaplan*, 891 F.2d at 1030 (quoting *Allegheny*, 492 U.S. at 599-600). *See also Flamer v. City of White Plains*, 841 F. Supp. 1365, 1376 (S.D.N.Y. 1993) (acknowledging that "[i]solated religious displays on *some* public properties may indeed send a message of government endorsement of religion") (emphasis added).

21. The analysis set forth in *Kaplan* was reaffirmed by the Second Circuit in *Chabad-Lubavitch of Vermont v. Burlington*, 936 F.2d 109 (2d Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 3026 (1992). *Chabad* followed *Kaplan* in holding that the display of a Menorah in City Hall Park, a traditional public forum, violated the Establishment Clause. The Court of Appeals again focused on the Menorah's status as " 'an unattended, solitary religious symbol' " located in a park " 'close[ly] associat[ed] with the seat of city government.' " *Chabad*, 936 F.2d at 112 (quoting *Kaplan*, 891 F.2d at 1030).

22. The court also notes that the Second Circuit does not stand alone in adopting this view. The Fourth Circuit, in *Smith v. County of Albemarle, Va.*, 895 F.2d 953 (4th Cir.), *cert. denied*, 498 U.S. 823 (1990), held that the County could not permit the Jaycees to erect a creche on the lawn of a county office building without violating the Establishment Clause. The Fourth Circuit approved of the District Court's analysis, including its focus on the fact that the creche was displayed in the context of a government site where "one could not readily view the creche without also viewing the trappings and identifying marks of the state." *Smith*, 895 F.2d at 955.

23. The court further finds that the case at bar is distinguishable from *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd*, 471 U.S. 83 (1985) and *Flamer v. City of White Plains*, 841 F. Supp. 1365 (S.D.N.Y. 1993), because those cases involved public parks that were *not* closely associated with seats of government. By contrast, the Trumbull Green *abuts* the seat of government; to paraphrase *Kaplan*, the Trumbull Green "is not any [Green] but rather [Town Hall Green]." *Kaplan*, 891 F.2d at 1029.

24. This factual distinction also distinguishes two recent cases from other circuits, *Kreisner v. City of San Diego*, 1 F.3d 775, 776 (9th Cir. 1993), which held that a city may permit a private free-standing religious display in a traditional public forum "*removed from the seat of government*" without violating the Establishment Clause (emphasis added), and *Doe v. Small*, 964 F.2d 611, 619 (7th Cir. 1992), which found that "the mere presence of religious symbols in a public forum does not violate the Establishment Clause, since the government is not presumed to endorse every speaker that its fails to censor in a quintessential public forum *far removed* from the seat of government." (Emphasis added).

25. In sum, while the public forum consideration is an important one, it is insufficient to dispel the message

of endorsement that would be conveyed by a lighted creche, situated next to a Christmas tree, located in a highly visible spot directly in front of the Town Hall. As *Kaplan* found, the fact that the solitary, unattended religious symbol is located in a traditional public forum is "simply a factor to be taken into account in determining whether the context of the display suggests government endorsement," *Kaplan*, 891 F.2d at 1029, and the court finds that it is not a sufficient factor to remove the display's message of government endorsement of religion in the context at issue here. *Compare Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1396 (11th Cir. 1993) (Anderson, J., concurring) (noting that the majority's analysis treated the fact that the religious display was located in a public forum as "the single most significant factor" indicating that a reasonable observer would not perceive a message of government endorsement of religion).

26. The court therefore finds that, on balance, for the Town to allow the creche would have the primary effect of advancing religion and thus would violate the Establishment Clause.

27. The court must now consider whether the Town's policy of excluding displays of solitary, unattended religious symbols from the Green is narrowly tailored to achieve its interest in avoiding an Establishment Clause violation. Again following *Kaplan*, the court concludes that it is. The *Kaplan* court, addressing Burlington's denial of permission to erect a Menorah in City Hall Park, stated that such a "prohibition on the display of unattended, solitary religious symbols would not run afoul of the constitutional requirement that "content-based exclusions' be 'necessary to serve a compelling state interest' and be 'narrowly drawn to achieve that end.'" *Kaplan*, 891 F.2d at 1030 (quoting *Widmar*, 454 U.S. at 270).

28. The Town's policy is narrowly tailored to avoid an Establishment Clause violation in that it is limited to displays of religious symbols, and is further limited to displays of those symbols on the Green. Indeed, there was testimony that the Town might take a different position on requests to place solitary, unattended religious diplays in other Town-owned public parks where the displays would also be highly visible.

29. In view of the foregoing, and in particular the court's view that *Kaplan* controls the instant action, the court finds that the plaintiffs have failed to show a likelihood of success on the merits.

30. Accordingly, the plaintiffs' application for a preliminary injunction is hereby DENIED.

SO ORDERED this 20th day of December, 1994 at Bridgeport, Connecticut.

/s/ Alan H. Nevas
ALAN H. NEVAS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civ. No. ———

DECEMBER 19, 1994

DONALD L. CREATORE; and KNIGHTS
of COLUMBUS COUNCIL NO. 2961,
Plaintiff,

v.

THE TOWN OF TRUMBULL, CONNECTICUT and
DAVIS [sic] A. WILSON, TRUMBULL FIRST SELECTMAN,
Defendant.

STIPULATION OF FACTS

1. Since 1981, the Town of Trumbull has decorated a large evergreen on the Trumbull Town Hall front lawn and had a holiday season tree lighting ceremony. Prior to 1981, at some point, the coaching club of Trumbull donated ornaments and decorated the tree.

2. For approximately the past 15 years, up to and including December 1992, the holiday display on the Trumbull Town Hall Green included both a decorated lit Christmas tree and a Menorah supplied by a local synagogue and also included holiday lights on the Trumbull Town Hall itself.

3. In 1993, the Town added to this display a large wooden sign with carved lettering as follows:

"SEASONS GREETING
PEACE AND LIBERTY FOR ALL"

4. In 1994, the Plaintiff Donald L. Creatore asked for permission to erect a creche, a nativity scene, on the front Town Hall Green and in May, 1994 First Selectman Wilson gave permission to do so.

5. First Selectman had in 1993, and again in 1994, received telephone calls, letters, seen newspaper articles, and had received comments from Trumbull residents, some heated, indicating both objections to and support for the holiday display, placement of a creche on the Town Hall Green and the Menorah on the Town Green.

6. First Selectman received in 1993 and 1994 threats of lawsuits in the events that religious symbols were left on the Town Hall Green, and likewise in the event that the First Selectman did not include a creche on the Town Hall Green display.

7. By letter dated December 14, 1994 the First Selectman notified the Plaintiff (copy attached) that for reasons contained in that letter the creche could not be installed.

8. No Menorah was displayed on the Trumbull Town Hall Green in 1994, before, during or after the Hanukkah festival.

9. A copy of the letter from First Selectman Wilson to the Plaintiff revoking permission is attached hereto.

10. There are residents of the Town of Trumbull who object and would be offended by the placement of a creche on the Town Hall Green as proposed by the Plaintiff as well as by placement of a stand alone Menorah on the Town Green.

11. The town green is a traditional public forum.

THE DEFENDANTS

By: _____

ARTHUR A. HILLER, ESQ.
GORDON AND HILLER
815 Main Street, Ste. 202
Bridgeport, CT 06604
(203) 335-1183
CT 09344

THE TOWN OF TRUMBULL

[Town Emblem]

Office of the First Selectman
Town Hall
5866 Main Street
Trumbull, Connecticut 06611

Telephone (203) 452-5005

Mr. Donald L. Creatore
61 Lorma Avenue
Trumbull, CT 06611

Dear Don:

To confirm our telephone conversation of this date, with regard to the placement of a creche on Town Hall Green in conjunction with our Annual Green Lighting Program, I have been advised that court cases leave no doubt that the solitary display of either a Menorah or Creche Scene on public property is unconstitutional.

While I indicated to you in the past that I have no objection to your proposal to place a creche on Town Hall Green if plans and specifications met our Building Official's approval, Court decisions indicate that such displays standing alone on a town hall green, the area symbolic of the center of government operation, are not permitted because they would go further than to create a holiday setting and to celebrate the season. For the Town to controvert the Courts would not be acceptable. We will continue to light the tree and decorate Town Hall.

Best regards,

/s/ David A. Wilson
DAVID A. WILSON
First Selectman

DAW:jep

FILED
FEB 28 1995

No. 94-1242

In The

Supreme Court of the United States

October Term, 1994

KNIGHTS OF COLUMBUS COUNCIL NO. 2961, and DONALD L. CREATORE,

Petitioners,

vs.

THE TOWN OF TRUMBULL, CONNECTICUT and DAVID A. WILSON, TRUMBULL FIRST SELECTMAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF

MARTIN B. MARGULIES
Quinnipiac College School of Law
303 University Avenue
Bridgeport, CT 06604-5769
(203) 576-4121

ARTHUR A. HILLER
Counsel of Record
Town Attorney
Town of Trumbull, Connecticut
815 Main Street, Suite 202
Bridgeport, CT 06604
(203) 335-1183

Attorneys for Respondents

6391
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Establishment Clause permits the display of a privately-sponsored, solitary, unattended religious symbol in a traditional public forum that is open to unattended non-religious symbols, when the forum is closely adjacent to a core government building.

STATEMENT OF THE CASE

The Statement of the Case in the Petition for a Writ of Certiorari is correct as to all facts that it contains. However, it omits two relevant district court findings: that the Trumbull Town Green adjoins the Trumbull Town Hall, a seat of government (Pet. App. 3A #3; 4A #10; 8A #17); and that before this lawsuit began, Town officials adopted a policy that bars the display of any solitary unattended religious symbols on the property (Pet. App. 5a #16).

RESPONDENTS' REASONS FOR NOT OPPOSING THE PETITION

This Court has granted certiorari in *Capitol Square Review and Advisory Board v. Pinette,* No. 94-780, in order to resolve what is in essence the same issue as the one at bar. But *Capitol Square's* facts create a very real possibility that the Court will decide that case without reaching this issue.

This Court, for instance, could find sufficient evidence of political viewpoint discrimination against *Capitol Square's* Ku Klux Klan plaintiffs to decide the case on that basis alone, either by affirming the Sixth Circuit's judgment (but not that court's reasoning), or by remanding for further fact-finding on the viewpoint discrimination question. *See* Petition for a Writ of Certiorari, No. 94-780, at 12-13. No such question arises in *Knights of Columbus.*

Alternatively, this Court could decide *Capitol Square* on the ground that the Petitioners in that case discriminated between different speakers within the same genre, *i.e.,* religious speech, because they allowed the display of an unattended menorah. *See Pinette v. Capitol Square Review and Advisory Board,* 30 F.3d 675, 676 (6th Cir. 1994). By so doing, the Court would leave for

another day the question of whether the genre as a whole enjoys Speech Clause protection under the circumstances. *Cf. Lamb's Chapel v. Center Moriches Union Free School District*, 509 U.S. ___, 113 S. Ct. 2141, 2146-47 (1993). This possibility, too, does not arise in *Knights of Columbus*. Though the Town had allowed a religious speaker to display a menorah on its Town Green during past holiday seasons, the district court found that the Town adopted a policy, prohibiting the display of all solitary unattended religious symbols on the property, before this litigation began (Pet. App. 5A#16).

Finally, this Court could base its decision on the fact that *Capitol Square's* religious symbol — a cross — is not a seasonal one, but rather is the principal, most familiar, and most powerful symbol of the Christian faith. If the Court decides the case on this basis, it might leave to another day the question of whether a more seasonal religious symbol is different. The *Knights of Columbus* display, in contrast, is a creche. The Town denies that a sacred religious object, such as a creche, can ever truly be "seasonal" in the same sense, for instance, as a Christmas tree. But at least a creche bears a closer relationship to the season than a cross does.

If this Court does base its *Capitol Square* decision on one or more of the above-mentioned grounds, the Town of Trumbull (in common with other communities across the country) will continue to face the same annual dilemma that it faced last December. If it denies a permit to a religious speaker who wishes to display a solitary, unattended religious symbol on its Town Green, the speaker will sue the Town. If it grants the permit, the Town's separationists will sue the Town, as some threatened to do this past year. Trumbull and other communities can escape from this annual dilemma only if this Court definitively resolves *Capitol Square's* certified issue — and *Knights of Columbus*, if accepted, is far likelier than *Capitol Square* to actually do so.

The Town would not have this Court suppose that it seeks only a resolution, and is indifferent to the outcome. On the contrary, the Town firmly believes that its present policy of banning all solitary, unattended religious symbols from its Town Green is correct, and that the lower court decisions sustaining that policy are likewise correct. Such symbols, in the Town's judgment, have no place on public property abutting a core government building, because thus situated they send non-adherents a daunting exclusionary message — a message which none of the Town's citizens should have to endure. The Town argued this position vigorously in the *amicus curiae* brief which it submitted in *Capitol Square,* and is prepared to do so again on plenary review.[1]

The Town also believes, however, that it has another obligation to its citizens, which is to spare them, in future holiday seasons, the expense and divisiveness that this sort of controversy inevitably engenders. Accordingly, the Town cannot in conscience resist Petitioners' efforts to obtain, from this Court, what both sides hope will be a definitive ruling. The Town, in consequence, does not oppose, and indeed supports, the certiorari petition.

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1. The Connecticut Civil Liberties Union Foundation, a state affiliate of the American Civil Liberties Union, co-signed that *amicus* brief.

CONCLUSION

The Town agrees with the Petitioners that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ARTHUR A. HILLER
Counsel of Record
Town Attorney
Town of Trumbull, Connecticut
815 Main Street
Suite 202
Bridgeport, Connecticut 06604
(203) 335-1183

MARTIN B. MARGULIES
Quinnipiac College School of Law
303 University Avenue
Bridgeport, Connecticut 06604-5769
(203) 576-4121

Attorneys for Respondents